

- (1) Whether claimant was a full-time or part-time employee.
- (2) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant began working for respondent on April 6, 1995. From May 1, 1995, through June 2, 1995, she developed symptoms in her upper extremities and was diagnosed with bilateral carpal tunnel syndrome. She came under the care of Dr. Paul W. Toma and underwent a surgical release of her carpal tunnel syndrome on November 28, 1995. He found claimant to have reached maximum medical improvement on March 12, 1996, and rated her at 5 percent impairment of each upper extremity which converted to a 3 percent whole body impairment on each side and combined to a 6 percent whole body permanent functional impairment.

Claimant was examined by Dr. Revis C. Lewis on May 6, 1996, at the request of her attorney. Dr. Lewis assessed claimant a 16 percent whole body functional impairment as a result of her bilateral carpal tunnel syndrome.

Claimant was referred to Dr. Lanny W. Harris for an independent medical examination at the request of the Administrative Law Judge. Dr. Harris evaluated claimant on November 26, 1996, and, based upon his examination and diagnosis, found claimant to have suffered a 5 percent functional impairment to each upper extremity which converts to a 6 percent whole body functional impairment.

Dr. Toma was presented with a list of tasks performed by claimant over the 15 years prior to the date of accident. Dr. Toma felt claimant capable of performing 26 of the 29 tasks and was unsure of 3 of the tasks. This equates to a loss of task performing ability of 10 percent if one rejects the 3 tasks Dr. Toma was unsure of.

Dr. Lewis was also asked to consider the tasks performed by claimant over the 15 years preceding the accident. Dr. Lewis opined that, with the exception of one task, the task list prepared at claimant's request and marked as Lewis deposition Exhibit 3 was accurate. However, on cross-examination Dr. Lewis was asked numerous questions regarding specific tasks listed in Lewis deposition Exhibit 3. He was unable to discuss the physical requirements of operating an air saw, grinder, or router and did not even know what a router was. He was unable to state with any accuracy how often claimant would perform several of the tasks and could only discuss certain tasks such as dipping the coils in hot solder, taping coils, or bending coils by speculating as to the physical requirements of those jobs. It was clear from the cross-examination of Dr. Lewis that he was not able to testify with any accuracy regarding the task performing abilities of claimant as he did not understand the physical requirements of a substantial number of the tasks listed.

Claimant testified that she was hired as a full-time employee scheduled to work 40 hours per work. In reviewing the time sheets attached to the deposition of Cheryl Franklin,

it is noted that claimant only worked 40 hours per week on one occasion between the period of April 6, 1995, and June 2, 1995. However, claimant did testify that she was hired as a full-time, although temporary, employee. Cheryl Franklin, the personnel specialist at respondent's plant, acknowledged that claimant was hired as a temporary worker to work 40 hours per week. She acknowledged that, for the period April 6 through May 31, 1995, the plant was in operation 40 hours per week and claimant would have been expected to work 40 hours per week during that time.

Conclusions of Law

The Appeals Board will first consider whether claimant was a part-time or full-time employee. Claimant testified that she was hired to work 40 hours per week as a full-time employee. This testimony, rather than being contradicted, was supported by the testimony of Cheryl Franklin when she indicated that from April 6 through May 31, 1995, the plant was in operation 40 hours per week and claimant would have been expected to work 40 hours per week during that period. While claimant missed numerous days and worked only one full 40-hour week during the period in question, the issue is the number of days or half days that the employee regularly worked "or was expected to work." K.S.A. 44-511(b)(4).

In this instance, the Administrative Law Judge found claimant to be a part-time employee and used the stipulated average weekly wage of \$169.34 per week. The Appeals Board finds that claimant was hired full time, although temporary, and was "expected to work" 40 hours per week on a regular basis. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board, therefore, finds claimant's average weekly wage for the date of accident to be \$240 as stipulated by the parties.

The Administrative Law Judge, in finding claimant a part-time employee, limited claimant to her functional impairment as it has also been stipulated by the parties that claimant had returned to work at the time of the regular hearing earning \$5 per hour working 40 hours per week. This computes to \$200 per week which would exceed the stipulated \$169.34 average weekly wage used by the Administrative Law Judge. It was for this reason that the Administrative Law Judge denied claimant work disability, applying the 90 percent rule of K.S.A. 44-510e(a). However, in finding that claimant is a full-time employee with a \$240 per week average weekly wage on the date of accident, the Appeals Board finds claimant eligible for work disability.

K.S.A. 44-510e(a) states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the

extent of permanent partial general disability shall not be less than the percentage of functional impairment.

There were two opinions placed into evidence regarding the claimant's loss of ability to perform tasks over the 15 years preceding her accident. The opinion of Dr. Lewis, as discussed above, was vague, ambiguous, and inaccurate with regard to several of the tasks performed by claimant. As such, the Appeals Board finds the opinion of Dr. Lewis to be unreliable and not credible.

On the other hand, Dr. Toma, the treating physician, had the opportunity to review the task list and found claimant capable of performing 26 of the 29 tasks listed therein. This would result in a 10 percent loss of task performing ability.

K.S.A. 44-510e(a) requires an average between the loss of task performing ability and the difference between the average weekly wage earned at the time of the injury and the average weekly wage that the worker is earning after the injury. It was stipulated by the parties that claimant is making \$200 per week currently at Coastal Mart in Pittsburg, Kansas. In comparing the \$200 per week current wage with the \$240 per week average weekly wage found by the Appeals Board, it is found that claimant has a 17 percent loss of wage earnings.

In averaging the task loss with the loss of wage earnings, the Appeals Board finds claimant has a 13.5 percent permanent partial disability resulting from the injuries occurring through June 2, 1995.

As K.S.A. 44-510e(a) limits work disability to no less than claimant's functional impairment, the Appeals Board must determine the appropriate functional impairment in this instance. Dr. Lewis found claimant to have suffered a 16 percent whole body functional impairment as a result of the injuries on the dates in question. Both Dr. Toma and Dr. Harris, on the other hand, found claimant to have suffered a 6 percent whole body functional impairment. The Appeals Board finds that the opinions of Dr. Harris and Dr. Toma are the more credible and finds claimant has a 6 percent whole body functional impairment stemming from the upper extremity injuries suffered while employed with respondent. As the 13.5 percent permanent partial disability exceeds the 6 percent functional impairment, the Appeals Board awards claimant a 13.5 percent permanent partial disability to the body as a whole.

In all other regards the Award of the Administrative Law Judge is affirmed insofar as it is not contrary to the findings expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Steven J. Howard dated October 7, 1997, should be, and is hereby, modified and an award is granted in favor of the claimant, Donna Jo Pride, and against the respondent, Able Design Plastics, Inc., and its insurance carrier, Travelers Insurance Company, for a 13.5% permanent partial disability to the body as a

whole based upon an average weekly wage of \$240 per week and an accidental injury date of June 2, 1995.

Claimant is entitled to 8 weeks temporary total disability compensation at the rate of \$160.01 per week totaling \$1,280.08 followed thereafter by 56.03 weeks permanent partial disability compensation at the rate of \$160.01 per week in the amount of \$8,965.36 for a total award of \$10,245.44 for a 13.5% permanent partial disability to the body as a whole. At the time of this award, the entire amount is due and owing in one lump sum minus any amounts previously paid.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Martin D. Delmont, C.S.R.	\$826.95
Deposition of Donna Jo Pride	
Deposition of Regular Hearing	
Deposition of Paul W. Toma, D.O.	
Deposition of Cheryl Franklin	
Hostetler & Associates, Inc.	\$222.85
Deposition of Revis Lewis, M.D.	
Evidentiary deposition of Lanny Harris, M.D.	

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Leigh C. Hudson, Fort Scott, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director